1978

Eldon L. anderson, Dba Silver Dollar Lounge v. Utah County Board of Commissioners, Yukus Y. Inouye, Karl R. Lyman, and Kenneth J. Pinegar As Commissioners : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ELDON L. ANDERSON, dba SILVER DOLLAR LOUNGE,

Appellant,

vs.

UTAH COUNTY BOARD OF COMMISSIONERS, YUKUS Y. INOUYE, KARL R. LYMAN, and KENNETH J. PINEGAR as Commissioners,

Respondents.

Case No. 15653

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF NATURE OF CASE

The appellant initiated this action in the Fourth District Court in and for Utah County, State of Utah, praying for an Extraordinary Writ to review and reverse the ruling by the Board of County Commissioners of Utah County which denied the appellant a business license.

DISPOSITION IN LOWER COURT

The Fourth District Court, in and for Utah County, State of Utah, the Honorable Allen B. Sorensen, Judge presiding, entered its Order dismissing the plaintiff/appellant's complaint, no cause of action, on the basis that the Utah

County Commission has the absolute authority to deny the issuance of a Class B Beer license without cause.

RELIEF SOUGHT ON APPEAL

Respondents seek an affirmation of the District Court's decision and findings that the Utah County Commission has absolute authority to deny issuing a Class B Beer license without cause. Respondents seek an order denying appellant's request for a restraining order pending the final determination of the plaintiff/appellant's second cause of action, in the event that this Court upholds the Lower Court's decision.

STATEMENT OF FACTS

Respondents respectfully disagree with the statement of facts as presented to this Court in the Brief of the Appellant in the following areas:

1. Page 3. Appellant states that the Sheriff was proceeding under Section 7-6-2 of the Utah County Ordinances when he refused to recommend approval of the appellant's license. In fact, the Sheriff was proceeding under Section 4-2-6 of the Utah County Ordinances, wherein the following language is found:

> "The application for such license, together with such information and certificate as is required by the County to be attached thereto, shall be referred to the Sheriff for inspection and report. The said Sheriff shall, within five days after receiving such application, make report to the

Commission of the general reputation and character of the persons who habitually frequent such place; the nature and kind of business conducted at such place by the applicant, or by any other person or by said applicant at any other place; whether said place is or has been conducted in a lawful, quiet and orderly manner; the nature and kind of entertainment, if any, at said place, whether gambling is or has been permitted upon the premises or by said applicant at any other place; and he shall add thereto his recommendation as to granting or denying said application. Upon receipt of said report, the Commission shall act upon the applicatic as it shall deem fair, just and proper in regard to granting or denying the same."

2. Page 3. Appellant alleges that no specific charges were ever filed against the appellant by the Utah County Attorney or the Sheriff regarding the premises being a nuisance. However, specific charges were filed against the appellant for serving beer to minors in violation of municipal ordinance and state law. The appellant was convicted in City Court, but the conviction was reversed on appeal to the Fourth District Court on the grounds of entrapment.

3. Page 4. Utah County Attorney merely stipulated to certain facts in the appellant's Memorandum of Authorities (R-8, 9, 10) and not to the Memorandum of Authorities in its entirety. The remaining Statement of Facts as set forth in appellant's Brief appear to be correct.

ARGUMENT

POINT I

THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT

THE UTAH COUNTY COMMISSIONERS HAD THE ABSOLUTE RIGHT TO DENY APPELLANT'S CLASS B BEER LICENSE.

Section 32-4-17 UCA (1953) confers upon the County the authority to regulate the sale of light beer. This section reads in part as follows:

> "Cities and towns within their corporate limits, and counties outside of incorporated cities and towns shall have power to license, tax, regulate or prohibit the sale of light beer, at retail, in bottles or draft; provided, that no such licenses shall be granted to sell beer in any dance hall, theater or in the proximity of any church or school. The commission granting the license shall have authority to determine in each case what shall constitute proximity." (emphasis added)

It appears to be well settled that a state may delegate power to regulate and prohibit the sale of alcoholic beverages. State v. Briggs, 46 Utah 288, 146 P. 261.

The appellant contends that the power to regulate and prohibit Class B Beer license by the County Commission is limited and that they may not absolutely refuse to issue licenses for the sale of beer. The great weight of authority holds that procedural due process need not be afforded where a liquor license is revoked or denied. State ex. rel. Garrett V. Randall, 527 S.W.2d 366, 371 (Mo.1975); Smith v. Iowa Liquor Control Commission, 169 N.W.2d 803, 807 (Iowa 1959); Nelson v. Hopper, 383 P.2d 588, 590 (Idaho 1963).

The rationale for this general rule is stated in 2 A.L.R.2d 1239, at page 1242:

"It is well settled that licenses issued for the sale of intoxicating liquors or beverages have no quality of a contract or of property, but are merely temporary permits to do what otherwise would be an offense against the law - that such a license is a mere privilege to carry on a business subject to the will of the grantor, and is not a contract between the licensee and the government, or property or a vested right."

In Shaw v. Orem City, 117 Utah 288 (1950) the Supreme Court ruled that the legislature intended that the sale of light beer be regulated solely by the State Liquor Commission and local authorities. The Court indicated that a beer license constitutes no property interest. The liquor license is merely a privilege conferred upon a licensee and subject to denial without affording due process at the will of the grantor. Court cited 46-0-131 UCA (1943) which is essentially the same as 32-4-17 UCA (1953), supra.

The appellant is proceeding under the mistaken notion that the criteria for denying his application is founded in 7-6-1 and 7-6-2 of the Utah County Revised Ordinances. Sections 7-6-1 and 7-6-2 concern revocation and do not address the issue presently before the Court, namely, the procedural requirements for granting or denying application for beer licenses. The applicable ordinance is 4-2-6 as stated supra in the defendant's Statement of Facts. This ordianance contains no provision that the commission exercise an objective standard of due process in making their determination nor is there any state statute which so provides.

In Riggins v. District Court of Salt Lake City, 89 Utah 183, 51 P.2d 645, the Court made it perfectly clear that the State had the authority to prohibit it's inhabitants from importing liquor into designated places where such liquors were sold illegally as common nuisances. Such authority has been conferred on the State Liquor Commission under the Liquor Control Act and conferred upon the County under Section 32-4-1 UCA (1953). The exercise of this authority is not contrary to any U.S. constitutional provision. The Court in Riggins supra further went on to say that the legislature intended to vest full power to control the liquor business in the Liquor Commission. This same power is also conferred upon the towns, cities and counties under Section 32-4-17 UCA (1953). Section 32-4-8 UCA (1953) is indicative of this legislative intent. It reads as follows:

> "The Commission, with or without a hearing, may at its discretion refuse to grant any license or permit applied for, and may revoke any license or permit at any time; and in no such case need any cause be stated. The acts of the Commission in giving or withholding consent or in granting, denying, or revoking licenses or permits shall not be subject to any review whatever, except in the cases in which such action has been procured by fraud. If at any time a licensee or permittee shall cease to possess all of the qualifications required by this act, it shall be the duty of the Commission to revoke his license or permit. All licenses and permits shall have incorporated therein the statement that they are granted subject to revocation as provided in this act."

Historically the liquor business has not stood in the same plane as other public administrative agencies, and the ruling of the Fourth District Court should be affirmed.

POINT II

THAT EVEN IF DUE PROCESS IS A REQUIREMENT TO TURN DOWN AN APPLICATION FOR A CLASS B BEER LICENSE, APPELLANT WAS NOT DENIED ANY RIGHT TO WHICH HE WAS ENTITLED, NOR DID THE COUNTY COMMISSION ACT ARBITRARILY OR CAPRICIOUSLY.

Assuming arguendo that the County Commission is subject to the same restrictions and the same criteria as other administrative agencies in granting or denying license applications, in this particular action of the Commission the denial of the application submitted by appellant was based on substantial evidence and thus it cannot be said that the decision of the Commission was arbitrary or capricious.

The general rule concerning judicial review of administrative hearings other than those pertaining to liquor control, appears to be best stated in 42 Am Jur2nd "Public Administration" Section 209 at Page 610:

> "In general, in the absence of valid statutory provisions or other factors affecting the scope and extent of judicial review, administrative determinations will not be interferred with by the courts unless, but will interfere with where, the determination is beyond the power which could constitutionally be vested in or exercised by an administrative authority; the determination is without or in excess of the statutory powers and jurisdiction of the administrative authority, the determination is in exercise of power so arbitrary or unreasonable as virtually to transcend

the authority conferred, or is otherwise an abuse of discretion, or is in disregard of the fundamental rules of the due process of law, as required by the constitution or statutory directions..."

In Central Bank and Trust Company v. Brimhall, 28 Utah 2d 14, 497 P.2d 638, the plaintiff (Central Bank) appealled the decision of the Bank Commissioner which granted an application to First Security Corporation to establish a bank in Springville, Utah, but denied the application of the plaintiff. Central Bank contended that the decision of the Commissioner was arbitrary and capricious. In affirming the Commissioner's findings, the Utah Supreme Court stated as follows:

> "Our duty is to look upon the whole evidence in the light favorable to the determination made by the Bank Commissioner in the trial court, and to sustain them if there is a reasonable basis in the evidence to justify doing so." (at 641)
>
> The Court further went on to say:
>
> "...[T]he well established rule is that the courts indulge [the Commissioner] latitude in determinations he makes on questions of fact and also in the exercise of his discretion with respect to the responsibilities which the law imposes upon him; and they will not interfere therewith unless it appears that he acted in excess of his powers, or that he so abused his discretion that his action was capricious or arbitrary." (at 641)

This quote (reasonable basis) spoken of in Central Bank supra was earlier defined as the "substantial evidence" in Uintah Freight Lines v. Public Service Commission, 119 Utah

491, 229 P.2d 675, wherein the Court stated:

> "It is not required that the facts found by the Commission be conclusively established, nor even that they be shown by a preponderance of the evidence. If there is in the record competent evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such facts finds justification in the evidence, and we cannot disturb it." (at 677)

Mulchay v. Public Service Commission, 101 Utah 245, 117 P.2d 298, 299. This substantial evidence test was again applied in Zions First National Bank v. Taylor, 15 Utah 2d 239, 390 P.2d 854, (1964) where the Supreme Court affirmed the Commissioner's decision and ruled that the Courts will not overrule the Commissioner's decision if supported by "any substantial evidence" and is not arbitrary or capricious, Id at 855. This substantial evidence rule is also set out in Davis Administrative Law Text, Section 29.01 at 525 (1972).

It should be noted again that the case presently before the Court deals with the denial of an application and not with the revocation of a beer license. A previous license granted by the Commission to the appellant was terminated by the terms of the license and not by some affirmative revocation procedure.

A failure to grant a license is inherent and the applicant should be reasonably aware of such. The appellant cites authorities which are concerned with the issue of revocation and then applied these holdings to the issue of

application denial as presently before the Court. A revocation and a denial of an application are clearly distinguishable. 35 A.L.R.2d 1067, 1068; Casala v. Dio, 13 A.2d 693, 65 RI 96 (1940).

In Richardson v. Perales 402 U.S. 389, 91 S. Ct. 1420, (1970), the United States Supreme Court ruled that reports in administrative hearings are admissible and may constitute substantial evidence supportive of a finding made by a hearing examiner against a claimant despite its heresay character, absence of cross examination and presence of opposing direct testimony by the claimant himself. In Richardson supra, the Court ruled that the level of due process required in administrative hearings is flexible and may vary. At page 1427, the Court stated:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grevious loss. Accordingly consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action."

Goldberg v. Kelly, 397 U.S. 254, 262-263, 90 S Ct. 1011, 1018, 25 L. ed. 2d 287 (1970). The Court further went on to hold that the evidence need only be relevant to be admitted. That the hearing should be informal so as to be understandable by the layman claimant and that the decision of

the hearing examiner be supported by substantial evidence. The Supreme Court went on to define "substantial evidence" as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (at 1427)

In the case presently before the Court, the County Commission granted the appellant two administrative hearings, and based its decision upon substantial evidence. At the time of both hearings, the Commissioners had before them a copy of the Sheriff's recommendation and copies of official incident and offense police reports concerning the Silver Dollar Lounge. These official reports indicated that over a six month period, the Sheriff's department had been summoned to the appellant's place of business to quiet disturbances and/or make arrests. In addition, Officer Scott testified at the August 6th, 1976 hearing, of violations he personally encountered while conducting spot checks on the premises. The administrative record also shows that the appellant admitted the following:

1. That he was convicted of a felony. Utah County Ordinance Section 4-2-7 holds that a convicted felon cannot qualify for a beer license.

2. That the appellant had permitted minors on

premises in violation of Utah County Ordinance Section 4-2-18.

3. That the appellant did willfully sell beer to patrons after hours in violation of County Ordianances.

The findings and the admissions stated above constitutes sufficient grounds for the denial of a Class B Beer license by the County Commission. The record clearly indicated that the County Commission had before it substantial evidence from which to justify their denial.

Pehrson v. City Council of Ephraim, 14 Utah 147, 46 P. 657, is cited by the appellant in his brief as authority for his position. However, Pehrson dealt with the issue of revocation and, in addition, the decision of the Court was based upon an 1892 statute which is no longer law.

CONCLUSION

For the foregoing reasons the judgment of the Trial Court should be affirmed:

1. The State of Utah has conferred upon it's Counties the absolute authority to grant or deny applications for beer licenses.

2. Even if the County did not have absolute authority, the County Commission did not act arbitrarily nor did it act capriciously in denying the application of the appellant. After affording appellant due process, the

decision of the respondent is supported by substantial evidence.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing to Matt Biljanic, Attorney for Appellant, 7355 South 9th East, Midvale, Utah, 84047, postage prepaid, this _____ day of _____, 1978.

Guy R. Burningham